STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: DECEMBER 15, 2022

IN THE MATTER OF:
Appeal Board No. 625278

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determinations, disqualifying the claimant from receiving benefits, effective March 17, 2022, on the basis that the claimant voluntarily separated from employment without good cause; and in the alternative, disqualifying the claimant from receiving benefits, effective March 17, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to March 17, 2022, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed August 9, 2022 (), the Administrative Law Judge sustained the initial determination of voluntary separation, and did not reach the initial determination of misconduct.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted by the claimant and on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as a teacher for a municipal school district for approximately sixteen years. She is a member of the union, subject to a collective bargaining agreement (CBA) with the employer. During

the 2021-2022 school year, the claimant worked in person, in her assigned school, as a third-grade special education teacher.

The employer notified the claimant on September 1, 2021, September 12, 2021, and September 23, 2021, via email, of the need to obtain the COVID-19 vaccination by October 4, 2021, to continue her employment. This direction was a result of an Executive Order from the NYC Commissioner of Health due to the COVID-19 public health emergency. The employer's failure to implement this policy could jeopardize its state funding.

On September 10, 2021, after an arbitration between the teacher's union and the employer, an agreement was reached allowing teachers to apply for religious and medical exemptions from the COVID-19 vaccination requirement. On September 20, 2021, the claimant requested a religious exemption from vaccination. The employer denied the exemption on September 22, 2021. The claimant appealed the denial to the municipal committee as per the CBA. In the interim, the principal of the claimant's school asked the claimant to obtain the COVID-19 vaccination or face discharge. The claimant refused vaccination and was placed on a leave without pay, effective October 4, 2021.

In February 2022, the municipal committee upheld the denial of the claimant's request for a religious exemption. The claimant understood that her failure to obtain vaccination would result in her discharge. The claimant was separated from her employment, effective March 17, 2022, for failing to obtain the COVID-19 vaccination.

OPINION: The credible evidence establishes that the claimant was separated from her employment as of March 17, 2022, when she failed to comply with the employer's COVID-19 vaccination requirement and provoked her own discharge. A provoked discharge occurs when a claimant voluntarily violates a legitimate known obligation, leaving the employer no choice but discharge. A provoked discharge is considered a voluntary leaving of employment without good cause for unemployment insurance purposes and subjects a claimant to disqualification from the receipt of unemployment insurance benefits. (See Matter of DeGrego, 39 NY2d 180 [3d Dept.1976]).

In this matter, the obligation in question is the employer's COVID-19 vaccination requirement. Significantly, this requirement was established for the purpose of complying with the Commissioner of Health's mandate that all public employees of the City of New York, including the New York City

Department of Education personnel, be vaccinated against COVID-19 during the worldwide pandemic.

The Courts have long held that New York State has the authority to regulate public health, including mandating vaccination, to curb the spread of disease. (See Matter of Garcia v. New York City Dept. of Health & Mental Hygiene, 31 NY3d 601 [2018], which upheld mandated annual influenza vaccinations for children attending childcare programs in New York City; Matter of C.F. v. New York City Dept of Health & Mental Hygiene, 191 AD3d 52 [2d Dept 2020], holding that a municipal agency had the authority to require immunizations of adults in an area where there was an outbreak of measles if authorized by law; and Matter of New York City Mun. Labor Comm. v. City of New York, 73 Misc.3d 621 [Sup. Ct. N.Y. Cnty. 2021], where the Court declined to grant a temporary restraining order of the implementation of the New York City Department of Education's COVID-19 vaccine mandate for its employees, noting that there was no dispute that the Department of Health and Mental Hygiene had the authority to issue the mandate and that the Court "...cannot and will not substitute [others'] judgment for that of New York City's public health experts," citing New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 v. Cuomo, 64 NY2d 233, 237-40 [1984]).

As a result of the severity of the ongoing COVID-19 crisis, the emergency regulation, requiring municipal teachers to be vaccinated against COVID-19, was justified by a compelling governmental interest. Therefore, we find that the employer's requirement that the claimant be vaccinated, in response to the mandate, was a legitimate, known obligation, and the employer had no choice but to end the claimant's employment when she declined to comply with the vaccination requirement.

Notwithstanding the denial of a religious exemption from vaccination, the claimant argues that her religious beliefs excuse her compliance from the vaccination requirement. Her contention, however, is unavailing. We note that the Supreme Court of the United States has held that, "... an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (see Employment Div. v. Smith, 494 US 872, 879 [1990]). The Court determined that, provided a law is neutral and not aimed at a specific religion, is generally applicable, and pertains to an area of law the government has the ability to regulate, it cannot be preempted by a religious practice. The Second Circuit of the United States Court of Appeals found that the vaccination mandate at issue here is

neutral, is generally applicable, and was a reasonable exercise of the State's power to protect the public health. (Kane v. De Blasio, 19 F. 4th 152, 2021 U.S. App. LEXIS 35102 (2d Cir. 2021). Thus, the claimant's religious beliefs do not take precedence over the mandate. Significantly, the United States Supreme Court has denied requests to block the vaccination mandate for New York City teachers. (See Keil v. City of New York, 2022 U.S. LEXIS 1379, March 7, 2022;. Maniscalco v. Bd. of Educ. of the City Sch. Dist. of N.Y. City, 2022 NYLJ LEXIS 399, April 18, 2022). Therefore, we find that the claimant's choice, to not comply with the employer's requirement, was volitional and without good cause. (See Appeal Board Nos. 624830, 623435 and 624566),

Even if the doctrine of provoked discharge is not applicable herein, we further find that a claimant who fails to take a step that is reasonably required for continued employment is deemed to have voluntary separated from employment. (See Matter of Wackford, 284 AD2d 770 [3d Dept 2001]). The claimant's continued unhappiness with the result of the union-bargained avenue for redress as to her desired religious exemption is not appropriate for this forum.

Accordingly, we conclude that the claimant voluntarily separated without good cause and under disqualifying circumstances. As a result, the initial determination of misconduct is rendered academic and the claimant's representative's legal arguments as to misconduct are not material. We continue to remain unpersuaded by the remainder of the claimant's representative's citations on appeal because they are unrelated to the issue before the Appeal Board.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective March 17, 2022, on the basis that the claimant voluntarily separated from employment without good cause, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER